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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL.,
Petitioners,

vs.

KEITH KELLY, RECEIVER

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MARION B. SOLOMON,
CHARLES L. BLACK,
JOHN W. STAYTON,
Counsel for Respondent,
Keith Kelly, Receiver.

INDEX

		Pages
I.	OPINIONS BELOW	1
II.	JURISDICTION	2
III.	STATEMENT OF THE CASE	2-10
IV.	SUMMARY OF THE ARGUMENT	10-11
V.	FIRST AND SECOND POINTS—Presenting proposition that, since the courts below have held that petitioners have no defense to the cause of action asserted by the receiver in the class suit, the judgments below rest upon adequate non-federal grounds	11-15
VI.	THIRD POINT—Presenting proposition that no federal question is presented because petitioners do not claim that they have a defense to the cause of action asserted by the receiver in the class suit, and do not claim that they would be entitled to judgment if that cause should be tried again	16-17
VII.	FOURTH POINT—Presenting proposition that a class suit will lie to assess the subscribers of a reciprocal insurance association	17-37
VIII.	FIFTH POINT—Presenting proposition that the finding of the three courts below that the class suit was properly conducted by the receiver is supported by substantial evidence and should be upheld	37-44
IX.	CONCLUSION	44-45
X.	APPENDIX	46-47

AUTHORITIES

Pages

United States Statutes:

Judicial Code, Sec. 237(b), 28 U.S.C., Sec. 344(b) ... 2

Texas Statutes:

Article 5029, Vernon's Ann. Civ. Stats. of Texas ... 32
Sections 15, 16a and 23, Article 8308, Vernon's Ann. Civ. Stats of Texas ... 33

List of Cases:

Ashwander v. Tennessee Valley Authority, 297 U. S. 288 ... 17
Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522 ... 12
Brown v. Clippinger, 113 Tex. 364, 256 S. W. 254 ... 4, 6, 15
Capital Endowment Co. v. State of Ohio, ex rel. Bowen, 296 U. S. 546 ... 13
Christopher v. Brusselback, 87 Fed. (2d) 762 ... 35
Christopher v. Brusselback, 302 U. S. 500 ... 30, 31, 34, 35
City of Tyler v. Texas Employers Ins. Assn. (Tex. Com. App.), 288 S. W. 409 ... 33
Clay v. Moore (Tex. Civ. App.), 175 S. W. (2d) 433 ... 3
Converse v. Hamilton, 224 U. S. 243 ... 20
Easterling Lumber Co. v. Pierce, 235 U. S. 380 ... 14
Empire Gas & Fuel Co. v. Noble (Tex. Com. App.), 36 S. W. (2d) 451 ... 5
Fox Film Corporation v. Muller, 296 U. S. 207 ... 13
Freeland v. Williams, 131 U. S. 405 ... 14
Gray v. Moore (Tex. Civ. App.), 172 S. W. (2d) 746 ... 23
Great Western Telegraph Co. v. Purdy, 162 U. S. 329 ... 19
Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S. W. (2d) 561 ... 4
Hansberry v. Lee, 311 U. S. 32 ... 36, 37
Hartford Life Insurance Co. v. Ibs, 237 U. S. 662 ... 25, 26, 30
Hawkins v. Glenn, 131 U. S. 319 ... 31, 32, 33, 34, 35

Pages

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 14
Holley v. Lawrence, Warden, 317 U. S. 518 13
Humble Oil & Refining Co. v. State (Tex. Civ. App.), 158 S. W. (2d) 336, writ refused 4
Humphrey v. Harrell (Tex. Com. App.), 29 S. W. (2d) 963 8
Irwin v. Missouri Valley Bridge & Iron Co. (C.C.A. 7), 19 Fed. (2d) 300, cert. den. 275 U. S. 540 24
Johnson v. Templeton, 60 Tex. 238 4
Kern Barber Supply Co. v. Freeze, 96 Tex. 513, 74 S. W. 303 5
Knox County v. Harshman, 133 U. S. 152 4
Levy v. Roper, 113 Tex. 356, 256 S. W. 251 4
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 15
Louisville and Nashville R. R. Co. v. Schmidt, 177 U. S. 230 14
McLean v. Morrow (Tex. Civ. App.), 137 S. W. (2d) 113 3
Marshall v. Holmes, 141 U. S. 589 4
Marye v. Parsons, 114 U. S. 325 13
Martin v. Burns, Walker & Co., 80 Tex. 676, 16 S. W. 1072 5
Mayhew & Isbell Lbr. Co. v. Valley Wells Truck Growers' Ass'n (Tex. Civ. App.), 216 S. W. 225 21
Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S. 53 15
Mitchell v. Pacific Greyhound Lines (Cal. Ct. of App.), 91 Pac. (2d) 176 ..... 23, 32
Modern Woodmen of America v. Mixer, 267 U. S. 544 20
New Jersey v. Sargent, 269 U. S. 328 13
Pink v. A.A.A. Highway Express, 314 U. S. 201 20
Pure Oil Co. v. Reece, 124 Tex. 476, 78 S. W. (2d) 932 4
Richardson v. Kelly (Tex. Sup. Ct.), 191 S. W. (2d) 857 1
Richardson v. Kelly (Tex. Civ. App.), 179 S. W. (2d) 991 1
Royal Arcanum v. Green, 237 U. S. 531 ..... 28, 29, 30
Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S. W. (2d) 958 39

Pages

Sergeant v. Goldsmith Dry Goods Co., 110 Tex. 482, 221 S. W. 259 ..... 21-22, 31
Smith v. Ferrell (Tex. Com. App.), 44 S. W. (2d) 962 4
Southern Ornamental Iron Works v. Morrow (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused 4, 23, 24, 34, 35
Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356 ..... 26, 27, 30
Switzer v. Smith (Tex. Com. App.), 300 S. W. 31 4
Treinies v. Sunshine Mining Co., 308 U. S. 66 12
Treadway v. Eastburn, 57 Tex. 209 4
U. S. v. Illinois Central R. R. Co., 291 U. S. 457 15
Voeller v. Neilston Warehouse Co., 311 U. S. 531 17
White v. Crow, 110 U. S. 183 4
Winters Mutual Aid Ass'n v. Reddin (Tex. Com. App.), 49 S. W. (2d) 1095 8

Text Writers and Other Authorities:

2 Moore's Federal Practice, pp. 2235-2245 24
2 Moore's Federal Practice, pp. 2237-2238 24

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Opinions Below

The opinion of the intermediate appellate court, the Court of Civil Appeals for the Third Supreme Judicial District of Texas, is reported in 179 S. W. (2d) 991 (R. 759-773). The majority opinion of the Supreme Court of Texas and the dissenting opinion of Justices Alexander and Sharp are reported in 191 S. W. (2d) 857 (R. 801-833).

Jurisdiction

Petitioners claim jurisdiction under Judicial Code, Section 237(b), 28 U.S.C., Section 344(b). Respondent submits, as will appear from the Summary of the Argument, that no jurisdiction exists because no federal question is presented by petitioners.

Statement of the Case

Petitioners brought this bill of review proceeding on behalf of themselves and on behalf of a class composed of all other subscribers at National Indemnity Underwriters of America, a reciprocal or interinsurance exchange,* who were not named as parties to the assessment suit but who as members of a class were bound by the judgment entered therein (R. 5, 27, 63, 143), to set aside such judgment, and to relitigate the issue of the liability of the subscribers to assessment. The judgment in the assessment suit (Cause No. 63,621), a class suit proceeding, adjudicated that those named as defendants in such suit were truly representative of and fairly and actually represented the whole class of subscribers at the Exchange (R. 658-659, 665); that the Exchange was insolvent, thereby making it necessary to levy an assessment against the subscribers at the Exchange (R. 660-661); and that each subscriber should pay an assessment equal to the amount of premiums booked and earned on all policies of insurance carried by him during any part of the insolvency period (R. 663).

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* Hereinafter referred to as the "Exchange."

The judgment entered in the assessment suit was a judgment in *rem* and not in *personam*. The judgment, in so far as the members of the class are concerned, names no subscribers and names no sums of money. Under State law, any subscriber sued for his assessment would be sued upon his subscription contract and not upon the judgment entered in the assessment proceeding, and such subscriber, when sued for his assessment, would be free to make any personal defenses available to him, *e. g.*, payment, that he was not in fact a subscriber during the insolvency period, or that the receiver was in error as to the amount of premiums booked and earned on the policies of insurance carried by the subscriber during the insolvency period, or that the party suing to recover the assessment had no interest in the cause of action asserted. *Clay v. Moore* (Tex. Civ. App.), 175 S. W. (2d) 433; *McLean v. Morrow* (Tex. Civ. App.), 137 S. W. (2d) 113, 120, writ dismissed.

The judgment entered in the assessment suit, Cause No. 63,621, contains extensive recitals as to the court's jurisdiction over those sued as members of a class. It recites the impossibility of making all 3200 subscribers parties to the suit; that those subscribers named as parties defendant stood in exactly the same position as the remaining subscribers who were sued as members of a class; and that those named as parties defendant were truly representative of and fairly represented the subscribers at the Exchange (R. 658-659). Under Texas law, these jurisdictional recitals are conclusive until set aside in a direct proceeding. *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d)

336, 343, writ refused.* This case applies to recitals concerning jurisdiction in class suit judgments, the settled law of the State to the effect that a recital in a judgment that the defendant was served with process is conclusive until and unless the judgment is set aside in a direct proceeding, even though the defendant was not in fact served with process. *Levy v. Roper*, 113 Tex. 356, 256 S. W. 251; *Brown v. Clippinger*, 113 Tex. 364, 256 S. W. 254.

Under State law [*Johnson v. Templeton*, 60 Tex. 238; *Smith v. Ferrell* (Tex. Com. App.), 44 S. W. (2d) 962] as under Federal law [*White v. Crow*, 110 U. S. 183; *Knox County v. Harshman*, 133 U. S. 152; *Marshall v. Holmes*, 141 U. S. 589], a party seeking to set aside a final judgment must allege and prove that he has a good defense which he was prevented from making by fraud, accident or the acts of the opposing party, wholly unmixed with any fault or negligence of his own. These requirements of a direct attack must be met where the judgment recites jurisdiction of the defendant, even though the party against whom the judgment was entered can prove, by showing lack of service upon him or otherwise, that the court did not in fact acquire such jurisdiction. *Treadway v. Eastburn*, 57 Tex. 209; *Switzer v. Smith* (Tex. Com. App.), 300 S. W. 31; *Pure Oil Co. v. Reece*, 124 Tex. 476, 78 S. W. (2d)

* The refusal by the Supreme Court of Texas of an Application for Writ of Error amounts not only to an approval of the judgment of the Court of Civil Appeals but to an approval of that Court's opinion. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S. W. (2d) 561; Humble Oil & Refining Co. v. State (Tex. Civ. App.), 158 S. W. (2d) 336, writ refused.

932; *Martin v. Burns, Walker & Co.*, 80 Tex. 676, 16 S. W. 1072.

The dissenting opinion contains the statement that the class suit judgment may be set aside without the showing of a meritorious defense because "it appears on the face of [the] record that the judgment is void" (R. 833). This is an inaccurate statement of the applicable State law since it has long since been settled in Texas that a judgment which contains recitals showing jurisdiction (as does the one here involved, pp. 3-4, *ante)* may not be set aside except through a bill of review proceeding in which a meritorious defense is pleaded and proved. We have cited above a few of the cases so holding.

The two cases cited in the dissenting opinion in no way support the statement in the opinion. In *Empire Gas & Fuel Co. v. Noble* (Tex. Com. App.), 36 S. W. (2d) 451, 454, one of the cases cited in the dissenting opinion, the Court states: "If a judgment is void, the party against whom it is rendered is not compelled to show a defense to the action in order to enjoin it * * *. However, if a judgment shows *upon its face* to be valid, every presumption will be indulged in favor of it." The judgment here involved "shows upon its face to be valid" since it contains elaborate recitals concerning the court's jurisdiction over those subscribers sued as members of a class.

In *Kern Barber Supply Co. v. Freeze*, 96 Tex. 513, 74 S. W. 303, the other case cited in the dissenting opinion, some question was raised as to the advisability of requiring a party to show a meritorious defense as a prerequisite to setting aside a judgment entered by a court which actually had no jurisdic-

tion over such party. However, any doubt expressed in that case was removed by the Supreme Court of Texas in *Brown v. Clippinger*, 113 Tex. 364, 366, 256 S. W. 254, 254-255, where the Court said:

"The writ of error was granted because of the doubt expressed in Kern Barber Supply Co. v. Freeze, 96 Texas, 516, 74 S. W., 303, whether the rule that a party seeking equitable relief to prevent the enforcement of a judgment against him, not void on its face, must show a meritorious defense to the cause of action on which the judgment was based, was properly applied to actions to set aside apparently valid judgments for want of jurisdiction of the person.

"The judgment which Brown sought to vacate recited facts which sustained the court's jurisdiction. It could not therefore be collaterally attacked with success in the courts of this state. Levy v. Roper, 113 Texas, 356, 256 S. W., 251. *If it was the correct judgment on the merits, a direct proceeding to vacate it would not have had a different result.* For, the party recovering a judgment must be made a party to a proceeding for its vacation, with the right to enforce any subsisting obligation of the complaint on which the judgment was predicated. If the complainant was truly bound to render to the plaintiff in the judgment all that the judgment required, his direct action must end with another adjudication against him having precisely the effect of that sought to be annulled. *Courts of equity do not sit to remedy injuries wholly technical and insubstantial.*"

In the instant case petitioners recognized when they prepared their pleadings that the class suit judgment was not void on its face and that they could only set it aside through a bill of review pro-

ceeding in which they alleged and proved that they had a good defense to the cause of action asserted in the class suit (R. 8-9, 19-27, 79-84, 139-140, 168-172). Furthermore, in the Court of Civil Appeals (R. 750) and in the Supreme Court of Texas (R. 797) petitioners urged that they were entitled to relief because they had a good defense to the cause of action asserted by the receiver in the class suit. *Petitioners have never contended at any point in this proceeding that the judgment entered in the class suit is void on its face and that they are entitled to set it aside without showing a meritorious defense.*

With the settled law of the State in mind, petitioners alleged below that they were not served with process in Cause No. 63,621; that they knew nothing about that suit until the judgment rendered therein had become final, with the consequence that they had no opportunity to appear and present their defense; that they were not adequately represented by the class representatives; and that they had a meritorious defense which they had been prevented from presenting through no fault of their own, the defense being that they were not liable for the assessment sought by the receiver (R. 8-9, 19-27, 79-84, 139-140, 168-172).

The receiver filed answers in the bill of review proceeding, and also filed cross actions against petitioners in which he sought personal judgment against each of them in a sum equivalent to the amount of premiums booked and earned by the Exchange on all policies of insurance held by each such petitioner during the insolvency period or any portion thereof (R. 119-135).

The judgment entered in the bill of review proceeding denied petitioners any relief and gave the receiver judgment against each petitioner in a sum equivalent to the amount of premiums booked and earned by the Exchange on all policies of insurance held by each such petitioner during the insolvency period or any part thereof (R. 185-206).

Under State law a proceeding by bill of review to set aside a final judgment completely reopens the cause in which the judgment was rendered and such cause must be tried anew. *Humphrey v. Harrell* (Tex. Com. App.), 29 S. W. (2d) 963; *Winters Mutual Aid Ass'n v. Reddin* (Tex. Com. App.), 49 S. W. (2d) 1095. In this bill of review proceeding Cause No. 63, 621 was completely reopened. As the Court of Civil Appeals states in its opinion: "They [petitioners] alleged that certain conduct of the Receiver in procuring the assessment judgment amounted to fraud, and that appellant [petitioner] subscribers at the NIU had a meritorious defense to the assessment, in that their respective contracts limited their liability 'to the amount of the premium deposit and the application fee provided for in this policy.' *The trial court heard these matters together and at length,* the statement of facts containing 726 pages, which in part explains the several hundred pages of powers of attorney, the applications for certificates to do business, and policies issued at the office of NIU before and during the insolvency period, photostatic copies of the originals being under the order of the court sent up with the record" (R. 759). Petitioners do not claim that the trial court in any way prevented them from proving

in the bill of review proceeding such defenses as they desired to urge to the cause of action asserted by the receiver in the assessment suit, Cause No. 63,621.

The Court of Civil Appeals affirmed the trial court's judgment upon the ground that petitioners had no defense to Cause No. 63,621, the assessment suit, and consequently were liable for the assessment fixed by the judgment entered in that cause (R. 760-770). In this connection the Court of Civil Appeals states in its opinion: "We prefer, however, to base our decision upon the issue that appellants [petitioners] did not show or prove a meritorious defense to the assessment liability of the subscribers at the NIU, rather than upon the practice questions" (R. 760).

The Supreme Court of Texas not only affirmed the judgments below but that Court also held that petitioners had no defense to the cause of action asserted in the assessment suit, Cause No. 63,621. This holding, while just as clear and explicit as the holding of the Court of Civil Appeals, requires some explanation. The Supreme Court of Texas was primarily concerned with the issue of whether a class suit would lie to assess the subscribers at the Exchange, and in order to determine this issue had to first decide whether *all* subscribers at the Exchange (including petitioners) were subject to assessment. That Court answered this question in the affirmative, *thereby overruling the defense which petitioners claimed to have to the class suit, the defense that they were not liable to assessment.* In holding that *all* subscribers were subject to assessment that Court said: "So, both in Southern Ornamental Iron Works

vs. Morrow, supra, *and in this case*, although the liability of each subscriber was several, *it was properly recognized that the duty to pay assessments was common to all* and resulted in a 'unity between them in the fund from which their rights were to be enjoyed,' and that, therefore, it was a duty which could be enforced in a class suit" (R. 811).

SUMMARY OF THE ARGUMENT

1. No federal question is presented by petitioners' contention that they were denied procedural due process in Cause No. 63,621, the class suit proceeding, because the State courts have held in this proceeding, to which petitioners were *actual* parties, that petitioners have no defense to the cause of action asserted against them in Cause No. 63,621. (See 11-15, *post.)*

2. No federal question is presented by petitioners' contention that they were denied procedural due process in Cause No. 63,621, the class suit proceeding, because petitioners do not contend that they have any defense to the cause of action asserted against them in that suit or that they could prevail in the suit if it should be retried. (See pp. 16-17, *post.)*

3. A class suit proceeding will lie to determine (1) the necessity for an assessment against the subscribers of a reciprocal insurance association; (2) the total amount of money to be raised by the assessment; and (3) the basis upon which each subscriber shall be assessed. Use of such a proceeding does not

deny procedural due process to those subscribers not actual parties to the suit. (See pp. 17-37, *post.)*

4. The finding of the three courts below that the receiver properly conducted the class suit proceeding is supported by substantial evidence and should be upheld. (See pp. 37-44, *post.)*

First Point

Petitioners chose to bring this bill of review proceeding, a proceeding to which they are *actual* parties, to set aside the judgment entered in the class suit. Under settled State law one prosecuting such a suit must plead and prove a meritorious defense to the cause of action asserted in the cause in which the judgment sought to be set aside was entered. In this proceeding the courts below have held that petitioners are entitled to no relief because they have no defense to the cause of action asserted by the receiver in the class suit. Consequently the judgments below rest upon adequate non-federal grounds, and petitioners' contention that they were denied procedural due process in the class suit presents nothing but an abstract question of law.

Second Point

If this Court should hold that petitioners were denied procedural due process in the class suit and if the judgments below should be reversed and the cause should be retried, the same judgments would be entered because petitioners could not meet the re-

quirements imposed by State law upon one prosecuting a bill of review, in that they could not show any defense to the cause of action asserted by the receiver in the class suit. Consequently petitioners' contention that they were denied due process of law in Cause No. 63,621, the class suit proceeding, presents nothing but an abstract question of law which this Court will not decide.

Argument

Petitioners present no federal question because they have had their day in court and have been held liable to assessment under the laws of Texas. Their Petition for Writ of Certiorari and Brief in Support Thereof are concerned only with the class suit; petitioners utterly ignore the fact *that the very issues raised by the class suit have been re-litigated in this bill of review proceeding brought by them*, a proceeding to which they are *actual* parties rather than parties by reason of membership in a class. Petitioners are entitled to their day in court, but conceding *arguendo* that they did not have their day in Cause No. 63,621, the class suit proceeding, *they certainly got it in this bill of review proceeding*, to which they are actual parties and in which they contended below strenuously and at length that they were not subject to assessment. Due process of law does not require that petitioners be given two opportunities to litigate the issue of their liability for assessment. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78.

As shown at pp. 4-5, *ante*, the State law afforded petitioners a means whereby they could set the class suit judgment aside if they could plead and prove that they had a good defense to the cause of action asserted by the receiver in the class suit, which defense they had been prevented from urging by fraud of the receiver and without fault on their part. Petitioners elected to avail themselves of this remedy furnished by State law, but they were unsuccessful in their suit because both the Court of Civil Appeals and the Supreme Court of Texas held, as pointed out at pp. 9-10, *ante*, that petitioners have no defense to the cause of action asserted by the receiver in the class suit; that they are liable for the assessment fixed by the judgment entered in that suit. Consequently the judgments below rest upon an adequate non-federal ground and will not be disturbed by this Court. *Fox Film Corporation v. Muller*, 296 U. S. 207; *Capital Endowment Co. v. State of Ohio, ex rel. Bowen*, 296 U. S. 546; *Holley v. Lawrence, Warden*, 317 U. S. 518.

If the judgments below should be reversed and the cause retried the same judgments would be entered because petitioners have no defense to the cause of action asserted by the receiver. Under these circumstances petitioners' contention that they were denied due process of law in the class suit presents nothing but an abstract question of law which this Court will not decide. *New Jersey v. Sargent*, 269 U. S. 328. "But no court sits to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U. S. 325, 330.

Petitioners do not directly contend that the bill of review proceeding which they elected to prosecute

denied them the right to adequately contest the issue of their liability for assessment. At common law, and in most jurisdictions today, and in the federal courts a bill of review proceeding is the remedy furnished a defendant who desires to set aside a judgment entered by a court which he claims had no jurisdiction over him. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 244. This Court has held that such a proceeding is consonant with due process of law. *Freeland v. Williams*, 131 U. S. 405, 418; *Louisville and Nashville R. R. Co. v. Schmidt*, 177 U. S. 230. Petitioners do complain of the fact that they had the burden of proof in the bill of review proceeding and in this connection state:

"All the petitioners ask is that they be permitted, in a fair and openly conducted trial, to have their day in Court where they may openly contest and litigate every step essential to the establishment of liability against them, *and where the burden of proof will be cast on the Receiver to prove up his case rather than on the Petitioners to disprove it* as has been their burden on this Bill of Review." (Brief, p. 46.)

The above quotation at long last sums up petitioners' case. Since they have had a "fair and openly conducted trial," their real contention is that they have been denied due process of law because they had the burden of proof in the bill of review proceeding; whereas in the class suit proceeding the burden rested upon the receiver. This Court has many times held that such a contention presents no constitutional question. *Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 382; *Minneapolis & St. Louis*

R. R. Co. v. Minnesota, 193 U. S. 53, 63; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81-82; *U. S. v. Illinois Central R. R. Co.*, 291 U. S. 457, 463-464. Petitioners voluntarily chose to file this bill of review proceeding, knowing that the burden of proof rested upon them, and it would seem unbecoming of them to now complain of the fact that they had the burden of proof in such proceeding.

Two remedies were available to petitioners to obtain relief from the class suit judgment. First, they were entitled under the settled State law to file this bill of review proceeding to have the class suit judgment vacated. Second, they were each entitled to await the filing of a suit by the receiver in an effort to collect from each the assessment decreed by the class suit judgment. Petitioners elected to resort to the remedy first mentioned—this bill of review suit. Having resorted to that remedy, the settled law of the State imposed upon them the burden of proving not only that the class suit judgment was invalid but that they had a meritorious defense to the cause of action asserted against them in that suit, for the reason that "it would be useless for a court of equity to set aside one judgment when the principles of equity would require another adjudication of like import." *Brown v. Clippinger*, 113 Tex. 364, 366, 256 S. W. 254, 255. Having elected to resort to this bill of review proceeding, in which the burden mentioned rested upon them, it is unnecessary to consider or decide what would have been their rights or burdens if each petitioner had awaited suit by the receiver to collect the assessment owed by each such petitioner.

Third Point

The State law gave petitioners a remedy consonant with due process of law, the right to file a bill of review proceeding in which they could have set aside the class suit judgment upon proof that they had a good defense to that suit which they had been prevented from urging by fraud of the receiver and without fault on their part. Petitioners elected to file such a suit; lost it, and now appeal to this Court to reverse the judgments below, but in such appeal do not claim to have any defense to the class suit, which means that they do not claim that they could obtain a favorable judgment if the judgments below should be reversed and the cause tried again. Consequently petitioners are asking this Court to decide a constitutional question when such decision is unnecessary to protect petitioners' rights.

Argument

As shown at pp. 12-13, *ante*, the State law gave petitioners a remedy consonant with due process of law, the right to file a bill of review proceeding to set aside the class suit judgment. As there shown, successful prosecution of such a proceeding would have required petitioners to plead and prove, among other things, that they had a good defense to the cause of action asserted by the receiver in the class suit.

Petitioners elected to avail themselves of the remedy furnished by the law of the State, but they were unsuccessful because, as pointed out at pp. 9-10

ante, the Court of Civil Appeals and the Supreme Court of Texas both held that petitioners have no defense to the cause of action asserted by the receiver in the class suit; that they are liable for the assessment fixed by the judgment entered in that suit. *But even if the courts below had not decided the issue of meritorious defense*, petitioners would present no Federal question of substance *because they do not claim to have any defense to the cause of action asserted by the receiver*. On the contrary, they dismiss the question of defense with the statement: "The question of meritorious defense, however, is not necessary to a decision of the Due Process questions before this Court." (Brief, p. 17.)

Why reverse the judgments below and retry the cause when petitioners in effect admit that the same judgments would have to be entered because of their inability to present a defense? It is plain that petitioners are seeking to have this Court decide a constitutional question, or an alleged constitutional question, when such decision is unnecessary to protect petitioners' rights. This Court will not decide the constitutional question in these circumstances. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345-348 (concurring opinion of Mr. Justice Brandeis); *Voeller v. Neilston Warehouse Co.*, 311 U. S. 531, 537.

Fourth Point

In Cause No. 63,621, the class suit proceeding, the court determined (1) the necessity for an assessment against the subscribers; (2) the total amount

of money to be raised by the assessment; and (3) the basis upon which each subscriber should be assessed. Petitioners were not served with process in that cause but they were made defendants as members of a class composed of all subscribers to the Exchange, a class all members of which rested under the *common* duty of creating a fund to discharge the obligations of the Exchange; and this class was represented in the cause by a group of subscribers who appeared and defended on their own behalf and on behalf of the class of which they and petitioners were members. This representation afforded petitioners due process of law.

Argument

Since the judgments below rest upon adequate non-federal grounds (pp. 11-15, *ante*), petitioners' contention that they were denied procedural due process by the class suit presents nothing but an abstract question of law. We will reply to petitioners because we believe their position, even in the abstract, is untenable.

Cause No. 63,621, the class suit, was prosecuted by a receiver appointed by a State court under State statute to liquidate the insolvent exchange or association of which petitioners were members (R. 761-762). In that proceeding the receiver sought a judgment decreeing that the Exchange was insolvent; that an assessment should be levied against the subscribers in order that the obligations of the Exchange might be discharged; that the subscribers were subject to assessment; and the rate of assess-

ment required to liquidate the Exchange (R. 762-763). In prosecuting this proceeding the receiver acted as the representative of injured workmen who were entitled to workmen's compensation payments under policies issued by the Exchange and as the representatives of all other parties who were creditors of the Exchange (R. 561-562, 657).

While petitioners contend that the "purpose of the suit was to impose a *personal* liability on the absent subscribers for the debts of the Exchange (Brief, p. 30), it is plain, as pointed out at p. 3, *ante*, that under State law the judgment sought in that suit and the judgment actually entered therein imposed no personal liability upon the absent subscribers. The judgment determined nothing but (1) the necessity for an assessment; (2) the total amount of money to be raised by the assessment; and (3) the basis upon which each subscriber should be assessed, that is, the manner in which the liability should be *prorated* among the subscribers.

The judgment entered did not go nearly so far in determining the ultimate liability of the subscribers as did the judgment considered by this Court in *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, a judgment "that a call or assessment be, and the same is hereby, made upon the stock and stockholders of the said company, * * * of thirty-five per centum of the par value of the shares of said stock subscribed for or held by them, being eight dollars and seventy-five cents on each and every share thereof." (162 U. S. 332.) This Court held that such judgment was not "a judgment against anyone" (162 U. S. 337); and that it was binding upon all stockholders, al-

though entered in a suit against the corporation to which the stockholders were not parties. See also *Converse v. Hamilton*, 224 U. S. 243, 256.

Use of a class suit to determine the foregoing questions did not deny procedural due process to those subscribers not made actual parties to the suit *because the relationship between the subscribers was such as to make it appropriate for a group of the subscribers to represent all of the subscribers.* There is more to a reciprocal insurance exchange or association than a bundle of contracts (powers of attorney) signed by the subscribers or members. Such an association functions as an entity and the members thereof acquire a *status* simply by reason of the fact that they are members. As Mr. Justice Holmes has stated: "The act of becoming a member [of a mutual association] is something more than a contract, *it is entering into a complex and binding relation*, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation." *(Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551.) In determining the relationship between the subscribers of the reciprocal association here involved the State courts necessarily considered the reciprocal contracts and the applicable Texas statutes, all matters of purely local concern. *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 211.

Any effort to compel a reciprocal association to meet its obligations is an effort to make the individual subscribers as a *group* meet obligations owed as a *group*. In fact the unity of the members of the reciprocal association here involved was an accom-

plished fact long before the institution of the class proceeding and long before the association was placed in the hands of a receiver. The members voluntarily achieved unity by operating as a reciprocal insurance exchange. The unity of the members was such that the members as a *group* wrote policies of insurance (R. 761-762). The unity of the members was such that the members, the class, could incur obligations in a *common name. Mayhew & Isbell Lbr. Co. v. Valley Wells Truck Growers' Ass'n* (Tex. Civ. App.), 216 S. W. 225.

The unity of the members of the reciprocal was such that they or it obtained a license to operate as an association through the members making common representations to the Board of Insurance Commissioners through a common agent (R. 770). The unity of the members of the association was such that they, the class, by issuing workmen's compensation policies thereby took from their employees the common law rights of such employees and required such employees and doctors, nurses and hospitals rendering services to them to look alone to the association for payment. (Art. 8306, Vernon's Ann. Civ. Stats. of Texas.) The unity of the members of the association was such that they were jointly and severally liable for claims of third parties. *Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 221 S. W. 259. In that case, the Supreme Court of Texas stated:

"As to third persons dealing with the association and to whom it incurred lawful debts contracted within the powers of whatever agency it employed, * * * the members of the association, as stated before, *are jointly and severally liable as principals.*

They could not create an organization, give it a name, invite others to sell it supplies or render it services, for instance, for their benefit, and not as principals be liable for such debts. The association was a fiction except as the members stood behind it. They are necessarily liable for debts to third persons incurred in carrying out the purposes for which they were associated. *They were the association.* Such transactions inured to their joint and several benefit. They should in the same measure pay what is owing upon them." (110 Tex. 490, 221 S. W. 261.)

In the instant case the receiver did not seek to impose joint and several liability upon the subscribers, but this in no way detracts from the fact that under State law the members of a reciprocal insurance association are jointly and severally liable in so far as claims of third parties are concerned. In this connection, the statement in the dissenting opinion that "regardless of what may have been the liability of the parties under the relations that *actually* existed among them, the suit under consideration was on alleged several obligations, and the judgment actually recovered was several, and not joint" (R. 826), furnishes no support for the position of the dissenting justices because "the relations that *actually* existed among them" (the subscribers) is of the greatest importance in determining whether or not a group of subscribers could stand in judgment for all subscribers.

The duties which the members incurred were reciprocal duties. In a reciprocal association like duties and obligations are exchanged. The duty owed by one party to a reciprocal undertaking necessarily af-

fects and is related to the duty of every other party thereto. The duty which the members of a reciprocal owe to each other, injured workmen and other creditors is at the very least a *common* duty . It is the duty to provide a fund to pay claims. This burden descends upon a party when he becomes a member of a reciprocal association, and not by reason alone of any language in the contract signed by him, but by reason of his *becoming a member* of the association, and a party to a reciprocal undertaking.

All members of the association are interested in the duty owed by them as a *group*, the duty to satisfy the obligations of the association. Their interest is common. Since all may be called upon to raise a fund to satisfy obligations of the association of which they are members, all are interested in *how* the fund shall be raised. Consequently their interest is common. Their duty is the same. The burden to be shouldered by one subscriber is the same as the burden to be shouldered by every other subscriber.

It seems plain from the foregoing that the relationship between the members or subscribers of a reciprocal insurance association is such that the question of whether the members shall be assessed and the amount thereof may be determined in a class suit proceeding in which a group of the subscribers represent all of the subscribers. The class suit device is commonly used and its use has been upheld by the courts without exception. *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused; *Gray v. Moore* (Tex. Civ. App.), 172 S. W. (2d) 746; *Mitchell v. Pacific Greyhound Lines* (Cal. Ct. of App.), 91 Pac. (2d) 176;

Irwin v. Missouri Valley Bridge & Iron Co. (C. C. A. 7), 19 Fed. (2d) 300, cert. den. 275 U. S. 540.

That a class suit may be filed in such a situation is demonstrated by Rule 23 of the Federal Rules of Civil Procedure which allows a class suit "when the character of the right sought to be enforced for or against the class is * * * joint, *or common.*" While this rule speaks of a "right" it is obvious that the rule has application when the *duty* sought to be imposed upon a class is a common duty. The language a "right sought to be enforced * * * against the class" is nothing but a somewhat clumsy reference to a "*duty* sought to be imposed * * * upon the class." 2 *Moore's Federal Practice*, pp. 2237-2238.

In the treatise last mentioned (pp. 2235-2245) Professor Moore discusses the binding effect of a judgment rendered in a true class action, the effect of a judgment rendered in a spurious class action, and the effect of a judgment rendered in a hybrid class action. In grouping the cases he places *Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused, a case holding that a class suit will lie to assess the members of a reciprocal insurance association, in the category of true class actions; he does so because the right sought to be enforced against the members and the duty sought to be imposed upon the members is *common* (p. 2289).

The dissenting opinion below (R. 817-833) is fundamentally erroneous because it is based upon the hypothesis that the rights held by each member of a reciprocal insurance association and the duties owed by each member are separate and distinct and

entirely unrelated to the rights held by, and the duties owed by, the other members; and that the rights held and the duties owed by a member depend entirely upon whatever bargain the member may have made with the association. The error in this assumption is exposed by the very name applied to the association here involved, *reciprocal* insurance association. It is obvious that an association is not *reciprocal* where the rights and duties owed by one member are entirely unrelated to the rights and duties owed by other members. In truth and in fact such rights and duties are, at the very least, *common* rights and duties; and the dissenting justices erred in holding otherwise.

The dissenting opinion is also fundamentally erroneous because it assumes that the judgment entered in the class suit was a judgment *in personam* against each subscriber. This is not true, as we point out at pp. 3, 19-20, *ante*.

This Court has held that procedural due process is not denied absent members by a class suit to assess the members of a mutual insurance association. In *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662, the mutual department of the company had forfeited Ibs' policy by reason of his failure to pay an assessment levied to meet some one hundred forty-five claims. When Ibs' widow sued on the policy the defense was forfeiture. In reply, the widow contended that the assessment levied to meet the 145 claims was invalid because there was then in the fund involved sufficient money to pay the 145 claims; that as a consequence the attempted forfeiture of Ibs' policy was ineffective.

In rebuttal, the company offered in evidence the judgment of a Connecticut court holding that the company had the right to maintain the fund as a reservoir to pay claims promptly *and that the company could make such an assessment as that levied against Ibs.* That judgment had been rendered in a suit brought by 31 members of the mutual department of the company for themselves and some 12,000 other members, as a class, against the company *to determine the company's right to assess the members to maintain the fund.*

In considering the effect of the Connecticut decree this Court said: "On that issue the Connecticut decree was admissible, since it adjudged that the Company had the right to make advances to pay claims *and could subsequently collect the amount of such claims by an assessment levied as in the present case.* Its right so to do having been determined by a court of competent jurisdiction, the decree was binding between the parties or their privies in any subsequent case in which the same right was directly or collaterally involved." (237 U. S. 673.)

We earnestly maintain that the court which entered the class suit judgment here involved had the same authority as the Connecticut court; that is, the authority to determine what assessment should be levied on the members of the association. We further submit that if the class proceeding upheld in the *Ibs* case afforded due process to those represented as members of a class, the instant proceeding did likewise.

In *Supreme Tribe of Ben-Hur v. Cauble,* 255 U. S. 356, the 70,000 members of Class "A" of the society

were held bound by a decree entered in a proceeding in a Federal court of Indiana in which they were represented by 500 members. One of the questions presented in that proceeding was:

"The right of the Supreme Tribe of Ben-Hur to require members remaining in Class 'A', and not transferring to Class 'B', to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class 'A'." (255 U. S. 358.)

In holding that the Indiana suit was a true class proceeding; that the right to entertain it was not dependent upon any rule of the Court; and that all members were bound by the decree entered therein, this Court said:

"* * * It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English Chancery. Street's Federal Equity Practice, vol. 1, § 549.

"* * * * * * *

"If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. *If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.*" (255 U. S. 366, 367.)

In the dissenting opinion below is the statement that the *Ibs* and *Cauble* cases "involved the rights of the members of the alleged class in property owned by them in common. None of them involved an attempt to recover on the several obligations of the members of the alleged class" (R. 824). This statement is inaccurate. In so far as the two cases are relied upon by us, they involved, not a fund owned in common, but the right of a particular association *to assess its members.* In the *Ibs* case this Court held that the class suit judgment conclusively determined the company's right to assess members of the mutual department; and in the *Cauble* case this Court held that the class suit judgment conclusively determined the right of the association "to require members remaining in Class 'A', * * * to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class 'A'." (255 U. S. 358.) Exactly the same issue was determined in the class suit here involved, *i. e.*, the right of the receiver of the association *to assess the members of the association.*

In *Royal Arcanum v. Green*, 237 U. S. 531, the governing body of the mutual had changed the by-laws, and thereby increased the rates charged the members. Thereafter, 16 members, on behalf of themselves and thousands of other members, filed a class suit against the association to vacate the by-laws on the ground that the change was "violative" of *contract* rights." (237 U. S. 537.) In that litigation a judgment was entered holding the increase in rates valid.

After the foregoing judgment was handed down

the validity of the increase in rates was at issue in litigation between the association and the widow of one Green, a deceased member of the association. In this litigation this Court, in holding that the decree in the class suit that the increase in rates was valid was conclusive, said:

"Indeed, the accuracy of this conclusion is irresistibly manifested by considering *the intrinsic relation between each and all the members concerning their duty to pay assessments* and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized." (237 U. S. 542.)

What possible distinction can be drawn between the foregoing case and the instant case? There, the question involved was as to the rate of assessment of the members. Each member rested under the burden of paying assessments; the burden was *common* to all. The very subject-matter of the class suit was the *common* duty which rested on the members. It was held that the class suit judgment was conclusive as to those not actually parties, even though these latter contended that the decree fixing their rate of assessment was "violative of contract rights." (237 U. S. 537.)

In the class suit involved in the instant case the question was as to the rate of assessment of the members. The burden of paying assessments rested upon all members as a *group*. The members rested under a *common* duty, just as did the members involved in *Royal Arcanum v. Green*.

As a final argument here let it be supposed that the Exchange, acting through the attorney in fact, had levied the assessment here involved and had attempted to collect such assessment from the members. It seems clear to us that in such situation those members who took the position that their rights were violated by the levying of the assessment could have brought a suit on their own behalf and on behalf of all other members to determine the right of the association to levy and collect the assessment and that such a proceeding would have been compatible with procedural due process. That is exactly what was done in the *Ibs* and *Ben-Hur* cases. If the members could bring a class suit to test the validity of an assessment made by the association, it follows that a class suit could be brought against the members to determine the same thing.

Petitioners rely almost entirely upon this Court's opinion in *Christopher v. Brusselback*, 302 U. S. 500. That case is not in point for the following reasons:

First: There is no such relationship between a corporation's stockholders who are by statute made liable to an assessment (the situation involved in the *Brusselback* case) as there is between the members or subscribers of a Texas reciprocal insurance exchange. The corporation is an entity separate and

apart from its stockholders and the stockholders are not subject to assessment at all unless made so by statute; whereas, under State law, the members of a reciprocal insurance association *are the association. Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 490, 221 S. W. 259, 261. (See pp. 21-22, *ante.)* Under State law the members are jointly and severally liable for the claims of third parties, and even where the claims of the subscribers themselves are involved the members of the association rest under a *common* duty, the duty to create a fund to discharge such claims. Obviously, there is a closer relationship between such members than there is between a corporation's stockholders who are by statute made liable to assessment. A holding that under certain circumstances a class suit will not lie to assess the latter, even if made in the *Brusselback* case (which respondent denies), is not controlling in a case involving the propriety of a class suit to assess the members of a reciprocal insurance association.

Second: The holding in the *Brusselback* case is based squarely upon the proposition that the assessment liability of the stockholders there involved did not constitute an asset of the corporation which could be availed of by the corporation or its receiver, with the consequence that a court could not do what was done in *Hawkins v. Glenn*, 131 U. S. 319, *i. e.*, order the assessment which should have been made by the corporation itself. In *Hawkins v. Glenn*, this Court held that a court of equity could entertain a suit against a corporation to fix the liability for assessment of its stockholders and that any decree entered

in the suit would bind all stockholders of the corporation, even those not made parties to the suit, upon the ground that they were adequately represented by the corporation. That holding was explained and approved in the *Brusselback* case upon the ground that the Court in *Hawkins v. Glenn* was ordering done what the corporation itself should have done—assess the stockholders. However, that holding was held inapplicable in the *Brusselback* case because the assessment liability of the stockholders there involved was not an asset of the corporation and their obligation to creditors (liability to assessment) was an obligation which could not have been enforced by the corporation itself or by its receiver. Consequently, this Court held in the *Brusselback* case that the corporation could not stand for its stockholders.

In the instant case the subscribers' liability to assessment is an asset of the Exchange *(Mitchell v Pacific Greyhound Lines* (Cal. Ct. of App.), 91 Pac. (2d) 176, 180), and the Exchange itself, or rather the attorney in fact for the members or subscribers, should have assessed the members in a sufficient amount to satisfy the obligations of the Exchange. Article 5029, Vernon's Ann. Civ. Stats. of Texas (set out at page 52 of Petitioners' Brief) provides that the members of a reciprocal association shall at all times maintain a reserve of not less than ten thousand dollars, and that if the reserve falls below this amount, "then the subscribers, or their attorney for them, shall make up any deficiency." Under this statute the Exchange, or rather the attorney in fact who operated the Exchange, should have forced the subscribers to maintain the *constant* reserve re-

quired. It was the failure to perform this statutory duty that led to the insolvency of the Exchange, and resulting receivership; and which created the necessity for assessment of the subscribers. Furthermore, Sections 15, 16a and 23 of Article 8308, Vernon's Ann. Civ. Stats. of Texas, a workmen's compensation statute (Appendix, pp. 46-47), require any association writing workmen's compensation insurance (the main business of the Exchange here involved, R. 817) to maintain a reserve "sufficient for the payment of its incurred losses and expenses," and provide that if such reserve is not maintained, the association "shall make an assessment for the amount needed to pay such losses and expenses." This liability for assessment constitutes an asset of the association. *City of Tyler v. Texas Employers Ins. Assn.* (Tex. Com. App.), 288 S. W. 409, 412.

It is plain from the foregoing that the assessment liability of the subscribers here involved constituted an asset of the Exchange, and it is further plain that the attorney in fact for the subscribers should have required the subscribers to pay an assessment in an amount sufficient to take care of the obligations of the Exchange. If this is an obligation which the association or its attorney in fact could have enforced against the subscribers, then it is likewise an obligation which can be enforced through a court of equity. The principle in *Hawkins v. Glenn*, 131 U. S. 319, is applicable, the only difference between this case and that case being that in *Hawkins v. Glenn* the corporation stood for its stockholders, who were subject to assessment; whereas, in the instant case a group of subscribers who were subject to assess-

ment represented all subscribers of the Exchange. If virtual representation was justified in *Hawkins v. Glenn* and if that proceeding did not deny due process of law to the stockholders who were not actual parties to the suit, then petitioners were not denied due process of law in the instant case by reason of the fact that they were represented in the assessment suit by a group of subscribers selected to represent them as a class.

Third: In the *Brusselback* case this Court emphasized the fact that no procedure whereby the stockholders of the corporation might be assessed had been provided by statute or by rules governing the corporation, with the consequence that the stockholders had no "warning" that they might be assessed in such an action as was there involved. (302 U. S. 504.) The contrary is true in the instant case because it had been determined in an opinion approved by the highest court of the State that subscribers or members of a reciprocal insurance association could have their liability for assessment determined in a class suit, *i. e.*, a suit brought by a receiver of the Exchange against a group of subscribers selected to represent a class composed of all subscribers. The opinion so holding *(Southern Ornamental Iron Works v. Morrow* (Tex. Civ. App.), 101 S. W. (2d) 336, writ refused) was handed down in January, 1937, whereas the Exchange here involved was not even placed in the hands of a receiver until December, 1937 (R. 802). Consequently petitioners and other subscribers had "warning" before their Exchange was placed in the hands of a receiver and long

before the assessment suit was filed that their liability for assessment could be determined in a class suit. By becoming members of the Exchange or by retaining their membership therein, after the warning given in *Southern Ornamental Iron Works v. Morrow*, petitioners and other subscribers assumed the risk that a selected group of subscribers might stand in judgment for all of them. (302 U. S. 504.)

Furthermore, even before the decision in *Southern Ornamental Iron Works v. Morrow* the subscribers of this reciprocal association knew that they rested under the duty of maintaining a fund adequate to take care of all claims; and they further knew that if they failed to perform their duty they could be brought to account through the "powers and procedure of a court of equity." *(Hawkins v. Glenn*, 131 U. S. 319, 330.)

Fourth: The *Brusselback* case did not involve a true class action. In that case the liability for assessment of the stockholders was not sought to be established in a plenary proceeding brought by *all* creditors or by a plaintiff representing *all* creditors. On the contrary, it was brought by "*certain* bondholders of the bank." (87 Fed. (2d) 762.) Furthermore, the proceeding was not brought against certain stockholders as representatives of a class but was brought against the "bank and all its stockholders," but service was had only upon stockholders residing in Illinois. (302 U. S. 501.)

It is plain from the foregoing that the *Brusselback* case did not involve a plenary proceeding brought by all creditors or a representative of all creditors (such

as a receiver) against certain stockholders sued as representatives of a class composed of all stockholders. For this reason the principle of that case has no application here where the receiver, on behalf of all creditors, sued a group of subscribers as representatives of a class composed of all subscribers.

Petitioners also rely upon *Hansberry v. Lee*, 311 U. S. 32, but that case is not remotely in point. There the prior decree which it was claimed rendered certain issues *res judicata* was entered in a suit brought by a single landowner in the restricted area on behalf of herself and other property owners in like situation to enforce an agreement allegedly executed by the property owners in the area, which stipulated that no part of the land in the restricted area should be sold to a negro. This Court held that the decree did not bind those who were opposed to enforcing the agreement and who were not parties to the prior litigation.

In the *Lee* case the judgment showed on its face that it was not binding upon Lee, *et al.* The very fact that the judgment was entered showed that there were two classes of property owners—those who desired to enforce the restriction and those who were opposed to its enforcement. *Yet there was no representation either through use of the class suit device or otherwise of those who were opposed to enforcement of the agreement.* The four individuals who were named as defendants in the first suit were not sued as representatives of a class; that is, as representatives of those landowners who did not desire that the covenant be enforced. It was obvious, there-

fore, from an examination of the judgment entered in the prior suit that Lee, *et al.*, were not represented in that proceeding and that they could not be bound by the judgment entered therein. In fact the judgment entered in the prior suit did not purport to bind those not named as defendants. (311 U. S. 46.)

In the *Lee* case each property owner had the right to elect whether he desired to enforce the covenant or oppose its enforcement. In the instant case no subscriber had the right to elect whether or not he would abide by his reciprocal undertaking.

In the dissenting opinion the point is made that all members of the class, the subscribers at the Exchange, did not have the same interest; that some of them were interested in having an assessment made, whereas others were interested in defeating any assessment (R. 830-831). There is nothing in this record to support any such conclusion, which probably explains *why petitioners make no such contention here.* Since petitioners make no such contention, we will give no further consideration to this phase of the dissenting opinion.

Fifth Point

The finding of the three courts below that the receiver properly conducted the class suit proceeding is supported by substantial evidence and should be upheld.

Argument

We will now consider the abstract question of whether petitioners were denied due process of law

by the manner in which the receiver conducted the class proceeding. This question is purely abstract because, as already pointed out at pp. 11-17, *ante*, petitioners have no defense to the cause of action asserted against them by the receiver, with the consequence that they cannot, under settled principles of State law, successfully prosecute a bill of review proceeding to set the class suit judgment aside, irrespective of any fraud that may have been perpetrated upon them by the receiver. What difference does it make whether petitioners were properly represented in the class proceeding now that the courts below in a proceeding to which petitioners were *actual* parties, have held that judgment should have gone against petitioners *in any event?*

We cannot accept as complete or accurate petitioners' statement as to the receiver's conduct. Petitioners seek to create the impression that the receiver prevented the 32 defendants and interveners in the class suit from obtaining a holding that the policies issued by the Exchange were non-assessable. This contention is not supported by the weight of the evidence.

The Court of Civil Appeals, after reviewing the voluminous record, held:

"* * * the evidence would support implied findings of the trial court * * * that the Receiver was not guilty of misconduct amounting to fraud in obtaining the assessment judgment in Cause No. 63,621." (R. 760.)

The Supreme Court of Texas made a similar holding (R. 816).

Mr. Kelly, the receiver, denied that he selected the class defendants so as to avoid a contest (R. 266). He checked Dun & Bradstreet for solvency of every defendant (R. 261). Twenty-five defendants in the first suit, No. 61,773, were also parties to the second suit, No. 63,621 (R. 511-528, 554-556). Mr. Kelly testified that he omitted from the second suit Sid Richardson and others who had filed pleas of privilege in the first suit, because he was afraid he could not maintain venue against them (R. 266).[1]

In the instant proceeding over one hundred subscribers (including petitioner Mid-Co Gasoline Company, whose pleadings were adopted by petitioners Sid W. Richardson and Richardson Oils, Inc., R. 173) sued these same parties as class representatives. *The same parties selected by the receiver as class representatives in the original proceeding, No. 63,621, were also selected and sued by these petitioners as class representatives in the instant suit* (R. 2, 63-64). If these parties afforded adequate representation of the class in the instant proceeding it would seem that they afforded such representation in Cause No. 63,621.

Petitioners' criticism of the amounts owed by the class representatives in Cause No. 63,621 is likewise unfounded. The premiums booked and earned from the 3200 subscribers amounted to only $402,000.00, making the average assessment less than $126.00 (R. 663). Most of the 123 subscribers who participated in this bill of review proceeding owed

[1] Petitioners agreed with him (R. 139, 154). See Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S. W. (2d) 958.

small amounts. Two owed only $1.79; nine owed less than $10.00 each; thirty-five owed less than $100.00 each (R. 838-841).

As to the thirty-two defendants and interveners in the original proceeding, No. 63,621, the record shows:

Two[2] were dismissed. One had died, the other could not be served (R. 267).

Six[3] defaulted. None of these parties testified. There is no evidence the receiver prevented them from defending the suit.

Five[4] answered by their attorneys and tendered into court the amount of their assessments. None of these parties testified. Their attorneys did not testify. There is no evidence Mr. Kelly influenced their actions.

Five defendants[5] filed defensive pleadings, but did not appear at the trial. None of said parties testified. Their attorneys did not testify. There is no evidence Mr. Kelly ever discussed the case with them or with their attorneys.

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[2] W. C. Moore and H. E. Cannon.

[3] Bell Furniture & Mattress Company, Inc.; H. E. Caton; O. G. Hanseler; Harry Knox Company; A. S. Hull d/b/a Hull Stationery & Printing Company; Lockhart's, Inc. (R. 652).

[4] Morris Catchman (R. 624); Lockhart Produce Company, Inc. (R. 643); C. W. Lott (R. 618); Oakhurst Land Company (R. 617); O. K. Warehouse Company (R. 616).

[5] Frank Del Curto (R. 645); Edwin M. Dezendorf (R. 641); O. P. Lockhart (R. 619); Gus J. Moos (R. 642); Owens-Snebold Oil Corp. (R. 621).

Six other denefdants* answered but did not appear at the trial. These parties did not testify. Carlisle Cravens of Cantey, Hanger, McMahon, McKnight & Johnson, was the attorney for three of them (R. 254-256). He did not testify. Mr. Kelly testified no agreement was made with Cravens prior to trial (R. 256). There is no evidence that Mr. Kelly prevented his attendance at the trial. Another subscriber, Rogelein Packing Company, was represented by the firm of Terrill, Davis, Hall & Clemmons. No member of that firm testified. There is no evidence that Mr. Kelly prevented their attendance at the trial, although he had discussions with Mr. Hall (R. 259).

Sterling P. Holloway testified concerning a settlement agreement (33 1/3 per cent discount) for Brownwood Public Service Co., but admitted that a dispute existed as to the amount of the premiums booked and earned on his client's policy (R. 317). This settlement was denied by Mr. Kelly (R. 260), and was never consummated (R. 314). Several months after the class decree the parties were still negotiating (R. 315).

Great stress is laid upon Kelly's alleged statement to Rogers, attorney for Foxworth-Galbraith Lumber Company, "You have caused me a lot of trouble about this thing." Rogers testified that Kelly was "joking

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*Rogelein Packing Company, represented by Terrill, Davis, Hall & Clemmons (R. 646); B. C. Bates, J. M. Garrett, and National Livestock Commission Company of Texas, represented by Cantey, Hanger, McMahon, McKnight & Johnson (R. 632, 633, 639); Brownwood Public Service Co., represented by Thompson & Barwise (R. 626); Foxworth-Galbraith Lumber Company, represented by Kilgore & Rogers of Wichita Falls (R. 630).

and laughing" at the time the statement was made (R. 301). Kelly testified that, while discussions of settlement were had with Rogers before the judgment became final, a settlement was not consummated until April 17, 1941 (R. 258). This is borne out by a letter (R. 698) and the release (R. 699). Rogers testified that the settlement "was a fair bargain openly arrived at" (R. 305), and he refused to testify that Kelly caused him to waive any defense to the suit, or that he had any particular defense in mind (R. 306).

Eight subscribers[7] appeared by their attorneys and defended the suit on its merits. Mr. Gresham, the attorney for three of said subscribers, testified that he represented his clients to the best of his ability; that Mr. Kelly made no attempt to prevent him from defending the suit or from introducing evidence (R. 382). Mr. Gresham testified that Mr. Kelly refused to discuss settlement with him prior to trial (R. 384).

Petitioners stress Evans' testimony to the effect that he made an agreement with Mr. Kelly whereby he would not "press his defense" (R. 286), but on cross-examination he failed to identify any evidence that he held back (R. 294). He testified that he acted in good faith during the trial (R. 294). The proceedings (R. 219-237) show a vigorous defense by Mr. Evans.

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[7]T. B. Hill, Harry Joseph and Riddle Oil Co., represented by Willis Gresham of Austin; Nick Linz, represented by Elbert A. Boynton of Austin; William H. Balzen, Russell C. Crawford, Krisch & Lanham, Inc., and W. R. Thrailkill, represented by O. Shelley Evans of San Antonio (R. 219, 286, 382).

In connection with the testimony of Evans it should be remembered that he had had a dispute with the first receiver, and a controversy with the second receiver over salary and possession of company records (R. 292) resulting in hearings before the Master and the Court (R. 262). Mr. Kelly denied the alleged settlement (R. 262).

A partial transcript[8] of the class proceedings is in evidence, consisting of 54 pages of testimony (R. 219-237, 388-400, 448-472), 34 pages of defensive pleadings (R. 616-650); 64 exhibits were introduced. Disregarding for the moment the impossibility of saying that the record here shows the class was improperly represented in the original proceeding, since a material part of the original proceeding is not in evidence;[8] yet, it is submitted that the record introduced shows proper representation.

The trial court had before him the books and records of the Exchange, the reciprocal contracts, the testimony of its manager (R. 458) and two bookkeepers (R. 221, 388). The State Examiner, who had audited the reciprocal exchange for six consecutive years, also testified (R. 466) and produced his audits (R. 468). Mr. Kelly also testified (R. 232).

So thoroughly were the principal issues covered

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[8] Thirty (30) exhibits in the original proceeding were not introduced below. They are: Exhibits 7, 8, 9, 10, 11, 13, 15, 16, 17, 18 and 19 (R. 220-224); Exhibits 1, 2, 3a, 3b, 4, 5, 6a, 6b, 7a, 7b, 7c, 7d, 8a, 8b of Coleman's deposition (R. 394-397); Vaughan's Exhibit 32 (R. 463); McClain's Exhibits 40, 41, 42 and 43 (R. 468-469). All exhibits identified in these depositions were in evidence in 63,621 (R. 282-283). These exhibits included the books and records of the association and four audits by the State Examiner.

in the original proceeding that the petitioners below did not, and do not now, question the findings as to the extent of insolvency of the Exchange, the insolvency period, the necessity for the assessment, the amount of assessment, and the assessment period. They confined their attack on the assessment proceeding to the contention that the policies were non-assessable, a point they cannot and do not urge here.

When the decree became final, on April 9, 1941, the court authorized the receiver to settle claims for assessments (R. 739). Pursuant thereto, Mr. Kelly settled with eight parties to the class proceeding. He testified concerning each of these settlements (R. 253-260) and said "That is all of them" (R. 260). He also withdrew from the registry of the court the assessments paid in full by five other defendants.

Mr. Kelly was his own attorney in the class proceeding. It was not shown that his discussions with attorneys for the defendants were wrongful or improper.

It is respectfully submitted the petitioners have failed to prove wrongful conduct of the receiver causing improper representation of the class. The record fails to show improper representation of the class; it fails to show any possible defense available to the class. In fact petitioners' contention that the class was not properly represented boils down to the contention that a defense should have been urged although none was available.

Conclusion

It is respectfully submitted that no federal ques-

tion of substance is presented by the petition for writ of certiorari and that the petition should be denied.

Respectfully submitted,

MARION B. SOLOMON,
CHARLES L. BLACK,
JOHN W. STAYTON,
Counsel for Respondent,
Keith Kelly, Receiver.

APPENDIX

Article 8308:

SEC. 15. If the association, at the end of any calendar year, is not possessed of admitted assets in excess of unearned premiums sufficient for the payment of its incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, first upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses show a deficiency for the group, and second only upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses show a surplus, and in no event shall it make an assessment for any aggregate amount more than is needed to pay losses and expenses. Every subscriber shall, in accordance with the law and his contract, pay his proportionate part of any assessment which may be levied by the association on account of losses and expenses incurred during any calendar year while he is a subscriber.

SEC. 16a. Whenever the Association shall have accumulated, at the end of any calendar year, an admitted surplus in excess of incurred losses, expenses and unearned premiums or other liabilities amounting to the sum of Two Hundred Thousand Dollars ($200,000.00) or more, the liability of its members to assessment under Article 8308, Section 15, shall be suspended, and it shall be authorized to issue policies not subject to assessment. It shall be the duty of the Board of Insurance Commissioners to deter-

mine promptly after the filing of the annual Statement of the Association, whether or not such an amount of surplus exists and if it finds that it does, it shall so state in a certificate. Such certificate shall remain in full force and effect for one (1) year or until such time as a later report to or examination by the Department of Insurance shall show the surplus to be less than Two Hundred Thousand ($200,000.00) Dollars, whereupon the Board of Insurance Commissioners shall cancel and revoke such certificate and require the Association to issue policies subject to assessment under Article 8308, Section 15, as they were prior to the time when such surplus of Two Hundred Thousand ($200,000.00) Dollars or more was first accumulated.

SEC. 23. The association shall set up and maintain reserves adequate to meet anticipated losses, carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and may be invested in such securities as are permitted to casualty companies organized under the General Laws; and, for the protection of its reserves and surpluses against the liability herein imposed, shall have the same right to reinsure or be reinsured as casualty companies organized under General Laws.